

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE CITY OF CORPUS CHRISTI,

Defendant.

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CIVIL ACTION NO. C-03-015

CONSENT DECREE

I. BACKGROUND

1. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the tire storage area of the J.C. Elliott Municipal Landfill in Corpus Christi, Texas (the "Site").

2. The Site is a landfill located at 7001 Ayers Street, Corpus Christi, Texas, and is owned by the Defendant City of Corpus Christi, Texas ("City").

3. The EPA conducted an emergency response action at the Site to abate the release or threatened release of hazardous substances from the Site, in accordance with Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1). Hazardous substances were released or threatened to be

released at or from the Site as the result of spontaneous combustion of a tire chip pile at the Site.

4. In the course of performing the emergency response action, EPA has incurred response costs at or in connection with the Site. The City, as owner of the Site, is a responsible party for these costs under CERCLA. The City disputes the recoverability of a portion of these response costs. The United States and the City have taken these disputes and other factors into account in entering into this settlement agreement.

5. The Defendant entering into this Consent Decree ("Settling Defendant") does not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint.

6. The United States and the Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over the Settling Defendant. Solely for the purpose of this Consent Decree and the underlying complaint, the Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. The Settling Defendant shall not challenge

the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

8. This Consent Decree is binding upon the United States and the Settling Defendant and its successor instrumentalities. Any change in legal status of the Settling Defendant shall in no way alter the status or responsibilities of the Settling Defendant under this Consent Decree.

IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" shall mean this Consent Decree. In the event of conflict between this Consent Decree and any other document, the Consent Decree shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies, or instrumentalities of the United States.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

i. "Parties" shall mean the United States and the Settling Defendant.

j. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that EPA or DOJ on behalf of EPA has paid at or in connection with the Site through November 30, 2002, plus accrued Interest on all such costs through such date.

k. "Plaintiff" shall mean the United States of America.

l. "Section" shall mean a portion of this Consent Decree identified by a Roman Numeral.

m. "Settling Defendant" shall mean the City of Corpus Christi.

n. "Site" shall mean the tire chip storage area of the J.C. Elliott Municipal Landfill, located at 7001 Ayers Street, Corpus Christi, Texas, at latitude 27° 42' 48" north and longitude 97° 50' 39" west.

o. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

10. Payment of Past Response Costs to EPA. Within thirty (30) days of entry of this Consent Decree, the Settling Defendant shall pay to EPA \$600,000.00, plus Interest accruing from the date of lodging of this Consent Decree with the Court until the date of payment of the settlement amount.

11. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with EFT instructions provided to the Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the Southern District of Texas, with said instructions being provided to the Settling Defendant within twenty (20) days of the entry of the Consent Decree.

12. At the time of payment, the Settling Defendant shall also send notice that payment has been made to EPA and DOJ in accordance with Section XII (Notice and Submissions). Such notice shall reference EPA Region 6, Site Identification Number 06HX, DOJ Case Number 90-11-3-07835, and the Civil Action Number.

13. The total amount to be paid pursuant to Paragraph 10 shall be deposited in the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH CONSENT DECREE

14. Interest on Late Payments. If the Settling Defendant fails to make the payment as specified under Paragraph 10 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

15. Stipulated Penalties.

a. If any amounts due under Paragraph 10 are not paid by the required date, the

Settling Defendant shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14, \$5,000.00 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within thirty (30) days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check or letter accompanying the check shall reference the name and address of the party making the payment, the Site name, the EPA Region, and Site ID Number 06HX, DOJ Case Number 90-11-3-07835, and the Civil Action Number. The Settling Defendant shall send the check and any accompanying correspondence to:

EPA Superfund - J.C. Elliot Landfill Tire Fire Site
Site ID # 06HX
CERCLIS # TXD0000605196
Superfund Accounting
P.O. Box 360582M
Pittsburgh, Pennsylvania 15251
ATTN: COLLECTION OFFICER FOR SUPERFUND

c. At the time of payment, the Settling Defendant shall also send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notice and Submissions). Such notice shall reference EPA Region 6, Site ID Number 06HX, DOJ Case Number 90-11-3-07835, and the Civil Action Number.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified the Settling Defendant of the violation or made a demand for payment but need only

be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

16. If the United States brings an action to enforce this Consent Decree, the Settling Defendant shall reimburse the United States for all costs of such action, including, but not limited to, costs of attorney time.

17. Payments made under this Section shall be in addition to any other remedies or sanctions available to the Plaintiff by virtue of the Settling Defendant's failure to comply with the requirements of this Consent Decree.

18. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse the Settling Defendant from payment as required by Section V or from performance of any other requirements of this Consent Decree.

VII. COVENANT NOT TO SUE BY UNITED STATES

19. Covenant Not to Sue by United States. Except as specifically provided in Section VIII (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against the Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This Covenant Not to Sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 10 (Payment of Response Costs) and any amount due under Section VI (Failure to Comply with Consent Decree). This Covenant Not to Sue is conditioned upon the satisfactory performance by the Settling Defendant

of its obligations under this Consent Decree. This Covenant Not to Sue extends only to the Settling Defendant and does not extend to any other person.

VIII. RESERVATION OF RIGHTS BY UNITED STATES

20. The United States reserves, and this Consent Decree is without prejudice to, all rights against the Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 19. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against the Settling Defendant with respect to:

- a. liability for failure of the Settling Defendant to meet a requirement of this Consent Decree;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

IX. COVENANT NOT TO SUE BY SETTLING DEFENDANT

21. The Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, its contractors, or employees with respect to Past Response Costs or this Consent Decree, including, but not limited, to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance

Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Texas, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

22. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

X. EFFECT OF SETTLEMENT

23. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The Parties expressly reserve any and all rights, defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

24. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this consent Decree. The “matters addressed” in this Consent Decree are Past Response Costs.

25. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, the Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by United States as set forth in Section VII.

XI. RETENTION OF RECORDS

26. Until five (5) years after the entry of this Consent Decree, the Settling Defendant shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any retention policy to the contrary.

27. After the conclusion of the five-year document retention period in the preceding Paragraph, the Settling Defendant shall notify EPA and DOJ at least ninety (90) days prior to the destruction of any such records, and, upon request by EPA or DOJ, the Settling Defendant shall deliver any such records to EPA. The Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, it shall provide the Plaintiff with the following: (a) the title of the record; (b) the date of the record; (c) the name, title, affiliation (e.g., company or firm), and address of the author of the record; (d) the name and title of each

addressee and recipient; (e) a description of the subject of the record; and (f) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to the Plaintiff in redacted form to mask the privileged information only. The Settling Defendant shall retain all records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

28. The Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

XII. NOTICES AND SUBMISSIONS

29. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States and the Settling Defendant.

As to the United States:

DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ# 90-11-3-07835)
P.O. Box 7611
Washington, D.C. 20044-7611

EPA:

Chief, Cost Recovery Section, 6SF-AC
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202

As to Settling Defendant:

City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

XIII. RETENTION OF JURISDICTION

30. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIV. INTEGRATION

31. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

32. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. The Settling Defendant agrees to the entry of this Consent Decree without further notice.

33. If, for any reason, the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party, and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVI. SIGNATORIES/SERVICE

34. Each undersigned representative of the Settling Defendant and the Chief, Environmental Enforcement Section of the United States Department of Justice to this Consent Decree certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

35. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

36. The Settling Defendant shall identify, on the attached signature page, the name and address of an agent authorized to accept service of process by mail on behalf of the Settling Defendant with respect to all matters arising under or relating to this Consent Decree. The Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local

rules of this Court, including, but not limited to, service of summons.

XVII. FINAL JUDGMENT

37. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling Defendant. The Court finds that there is no just reason for delay and therefore, enters this judgment as a final judgment under Federal Rules of Civil Procedure Rules 54 and 58.

SO ORDERED ON THIS _____ DAY OF _____, 2003.

Honorable Janis Graham Jack
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States of America v. The City of Corpus Christi*, Civil Action Number C-03-015, relating to the J.C. Elliott Landfill Tire Fire Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: 12/7/03

~~Bruce Gelber~~ Catherine R. McCabe
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice

Date: _____

Samuel D. Blesi
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Date: 11/24/03

FW Richard E. Greene
Regional Administrator, Region 6
United States Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Date: 11-5-03

I-Jung Chiang
Assistant Regional Counsel
United States Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

FOR THE SETTLING DEFENDANT

Date: 10-27-2003

George K. Noe

Agent authorized to accept service on behalf of above-signed party:

Name: George K. Noe
City Manager for the City of Corpus Christi
P.O. Box 9277
1201 Leopard Street
Corpus Christi, Texas 78469-9277